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ARGUING TITLE VII PROTECTS SEXUAL ORIENTATION, EEOC SIGNALS HISTORIC SHIFT IN ENFORCEMENT STRATEGY

By Brian McGinnis

On March 1, 2016, the Equal Employment Opportunity Commission (EEOC) announced it had filed two lawsuits charging employers with illegally discriminating against employees on the basis of their sexual orientation. These lawsuits, filed in federal courts in Pennsylvania and Maryland, strongly signal an evolution in the EEOC's enforcement strategy. While these complaints are noteworthy for their effect on the legal landscape, they also present significant practical implications for employers.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of sex but does not include protections for sexual orientation. As a result, many federal courts have declined to extend Title VII to cover discrimination solely on the basis of sexual orientation, on the theory that sex-based discrimination is separate and distinct from that based on sexual orientation. These newly filed EEOC lawsuits directly address this issue.

In its complaints, the EEOC alleges that employers subjected a gay male employee and a lesbian employee, respectively, to unlawful harassment. The alleged harassment included derogatory comments from supervisors targeting the employees' sexual orientations, sexual practices and nonconformity to gender stereotypes—including the use of epithets targeting sexual orientation. The EEOC argues that by allegedly failing to adequately address employee

complaints of a hostile work environment on this basis or by retaliating against an employee who complained about such harassment, the employers committed illegal sex discrimination under Title VII.

The EEOC's legal theory is relatively simple to understand. Discrimination on the basis of sexual orientation, it argues, involves sex discrimination as a matter of course, in that the employee's own sex is an indispensable component of the discriminatory acts. For example, an employer who fires an employee for being a lesbian has, by definition, fired her because she is a woman who is attracted to other women. In this way, the EEOC argues that sexual orientation cannot be artificially separated into its own category, but rather must be understood under the umbrella of sex discrimination prohibited by Title VII.

Employers should take note of this development. While legislative efforts to include sexual orientation as a protected category for purposes of Title VII have stalled in Congress over the past two decades, the EEOC's recent lawsuits signal that it plans to pursue sexual orientation-based suits in the employment context under existing law. Employers should consider the EEOC's new approach in reviewing their policies and practices.

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